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# IN THE
# SUPREME COURT
# OF THE UNITED STATES

OCTOBER TERM, 1964

NUMBER 1247

J. V. VANDENBERGE, ET AL., TRANSFERERS
OF TEXAS AUTO COMPANY,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

By:
J. V. VANDENBERGE, JR.
Of Counsel
LEROY G. DENMAN,
Attorneys for Petitioners.

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## INDEX TO AUTHORITIES

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**PETITION FOR WRIT OF CERTIORARI**

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of J. V. Vandenberge, D. E. Blackburn, and W. F. Wallace, transferees of Texas Auto Company, and Texas Auto Company, a Texas corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that Court entered in this case on February 12, 1945; and, as a basis therefor, shows as follows:

## I.

## SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(a) Nature of Suit and Summary of Facts.

This proceeding is one to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit affirming a decision of The Tax Court of the United States sustaining a determination by the Respondent of a deficiency in income and excess profits taxes against the Petitioner Texas Auto Company for the taxable years 1938 and 1939 in the following amounts:

| Taxable Year | Income Tax | Excess Profits Tax |
|---|---|---|
| 1938 | $ 175.00 | $ 50.27 |
| 1939 | 2,622.71 | 2,032.34 |
| | $2,797.71 | $2,082.61 |

And the consequent determination of liability therefor against the Petitioners Vandenberge, Blackburn and Wallace, as transferees of the Company. The four cases were consolidated by The Tax Court.

The controversy involves a determination of the Petitioner Texas Auto Company's "cost" of certain improved real estate purchased in 1922, as a basis for computing depreciation deductions claimed for the year 1938, and likewise as a basis for computing the gain realized from a sale of the property in 1939. The basic facts which give rise to the controversy are tersely, but none the less accurately, stated in the Circuit Court's opinion as follows:

> "In 1922 the Texas Auto Company purchased certain improved real estate. As consideration for the transfer, the Company paid notes aggregating $20,000.00 that were secured by liens on the property, and in addition secured the cancellation and return to the seller of unsecured notes aggregating $24,567.16, liabilities of the seller and "his business associates, held by the City National Bank, of Corpus Christi, Texas". (R. 59).

Upon a sale of the property in 1939 for $36,000.00, the respondent disallowed, as part of the 1922 cost, the amount of the unsecured notes, cancellation of which was obtained as a part of the consideration. Petitioners contended and now contend that the **cost basis** was $44,567.16, $25,000.00 representing cost of the building, and the remainder the cost of the land. Respondent confined his allowed cost to $20,000.00, the amount of the secured notes actually paid off in cash by the Auto Company, and was therein upheld by both The Tax Court and the Circuit Court. (R. 36,60). In other words, the Circuit Court held that while the cancellation of the unsecured notes was a part of the consideration, the amount thereof was not a part of the 1922 **cost.**

The circumstances under which the unsecured notes were cancelled have a material bearing on the question involved, but the Circuit Court's opinion does not adequately reflect them. The case was decided by The Tax Court upon a stipulation of facts which are here presented as briefly as practicable consistent with clearness and accuracy.

In December of 1922 the Petitioner Texas Auto Company purchased the improved realty in question from the J. C. Blacknall Company. At that time one J. C. Blacknall was operating his business under his individual name and through the medium of three associate companies, including said J. C. Blacknall Company, the then owner of the property. (R. 33).

The J. C. Blacknall Company, at the time of the conveyance, owed two notes, each for $10,000.00, secured by liens against the realty. Also, at the time of the conveyance, said Blacknall and his associates were indebted to the City National Bank, of Corpus Christi, Texas, to the extent of some $24,567.16, evidenced by six unsecured notes. (R. 33, 34).

Clark Pease, at the time of the 1922 conveyance, owned 45 per cent of the Texas Auto Company stock and subse-

quently acquired all the remainder. Likewise, Pease owned 315 out of 345 shares outstanding of the stock of City National Bank. In other words, Pease owned 21/23 of the bank stock. Pease and his bank made an agreement with Blacknall and the latter's associate companies that if Blacknall should have the realty involved conveyed to the Auto Company, Blacknall and associates would be released from all liabilities direct or indirect, to either Pease or his bank. (R. 34).

Pursuant to agreement, a conveyance of the property was made, reciting on its face a consideration of $10.00 "and other valuable consideration", and "subject to all existing indebtedness thereon". The two notes aggregating $20,000.00 and secured by liens on the property were paid off by the Auto Company, and, in accord with the agreement had between Pease and his bank, on the one hand, and Blacknall and his associates, on the other, the latter's unsecured notes to Pease's bank, aggregating $24,567.16, were cancelled and surrendered to Blacknall: In evidence of such cancellation, Pease's bank, in its federal income tax return for 1922, charged off an indebtedness of $25,000.00 against Blacknall and his associates, including the unsecured notes referred to above. (R. 33-34).

The cost of the real estate so acquired in 1922 was set up by the Auto Company in the ensuing year at $45,000.00, with $20,000.00 allocated to the land, and $25,000.00 to the building for depreciation purposes. Depreciation on the building, on such cost basis of $25,000.00 was subsequently claimed and allowed by the Respondent for income tax purposes for the years 1923 to 1937, inclusive, for an aggregate of $16,417.30. Depreciation in the amount of $1,400.00 for the year 1938 was claimed, but disallowed by the Respondent when, after a sale of the property, the Respondent decreased the theretofore accepted and recognized "cost" of the property to $20,000.00. The realty was

sold by the Auto Company in 1939 for $36,000.00 in cash. (R. 34-35).

In his determination of the deficiencies in question, the Respondent allowed an original cost of only $20,000.00, represented by the two secured notes above referred to, but the Respondent declined to allow the asserted additional cost of approximately $25,000.00 represented by the six unsecured notes which were charged off by the bank. The Respondent apportioned his allowed cost of $20,000.00 in the same ratio in which the Auto Company had apportioned its asserted cost of $45,000.00, i.e. 20/45 for the land and 25/45 for the building, the Respondent allocating $8,888.89 to cost of the land and $11,111.11 to cost of the building, while the Auto Company allocated $20,000.00 to cost of the land and $25,000.00 to cost of the building. (R. 35).

The Respondent ruled that the building had been fully depreciated by the deductions aggregating $16,417.30 prior to the allowance claimed for 1938. In computing gain from the 1939 sale, he allocated $26,000.00 for the land and $10,000.00 for the building. He consequently held that the taxable gain therefrom was the selling price, $36,000.00, less the cost of the land, $8,888.89, or $27,111.11 (R. 35, 59).

Petitioners do not dispute Respondent's allocation of the selling price, but dispute his determination of the cost basis.

(b) Question Presented.

The sole question presented herein is whether, under the undisputed evidence, the amount of $24,567.16 evidenced by the six promissory notes owed by Blacknall and his associates to the City National Bank, which the Bank and Pease agreed to and did charge off and surrender to Blacknall as a part of the consideration for Blacknall's conveyance of the property to the Auto Company, Constituted a part of the original 1922 "cost" of the improved realty involved, for the purpose of computing depreciation and gain under the Revenue Act.

## II.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in Arundel-Brooks Concrete Corporation vs. Commissioner, 129 Federal (2d) 762, wherein it has held, in construing the relevant sections of the Revenue Act here involved, that even though part of the money be donated by an interested party, the total cost of the asset, **not the net cost to the taxpayer**, is the proper basis to be used in determining depreciation as well as gain or loss, if the asset belongs solely to the taxpayer.

(b) The decision of the Circuit Court of Appeals is in direct conflict with the principles announced by this Honorable Court in Detroit Edison Company vs. Commissioner, 319 U. S. 98, wherein it was held that in computing depreciation under the relevant sections of the Revenue Act here involved, a property may have a cost history **quite different from its cost to the taxpayer**, the purpose of a fair tax administration being

> "to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets".

(c) The Tax Court and the Circuit Court of Appeals, in confining "cost", as that term is used in applicable provisions of the Revenue Act prescribing a basis for computing depreciation and gain or loss resulting from a sale, to "actual cost to the taxpayer", has so far departed from the accepted and usual course followed in the administration of the revenue laws, as to call for the exercise of this Court's power of supervision.

WHEREFORE, your Petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals

for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in this cause, numbered and entitled on its docket, No. 11,075, J. V. Vandenberge, et al, Transferees of Texas Auto Company, vs Commissioner of Internal Revenue, to the end that this said cause may be reviewed and determined by this Court according to law; and that your Petitioners may have such other and further relief as to the Court may seem proper and in conformity with law.

Respectfully submitted,

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